Supreme Court, U.S.
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No.

In The

# Supreme Court for the United States

October Term, 1994

BRUCE BUCHBINDER and ELAINE BUCHBINDER,

*Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the arbitrary dismissal of a litigant's cause of action before the Courts, especially an action being brought by a Pro Se Litigant, is the harshest sanction that can be imposed by the Courts, and whether such a sanction can rise to the level of a denial of proper Due Process, Right to Petition for Redress of Grievances, and Right to meaningful access to the Courts?

2. Whether a Court imposed monetary sanction for an allegation of misconduct that never actually took place, coupled with a second subsequent sanction of dismissal, rising from the same set of facts and similar events, would rise to the level of judicial usurpation, giving proprietorial necessity for this Court to invoke its appellate jurisdiction of review in order to curb further usurpations of this nature?

3. And whether an individual Pro Se Litigant has a Ninth Amendment right to refuse to pay a Court imposed sanction for an allegation of misconduct that never actually took place, barring being denied access to the Courts?

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## PRELIMINARY STATEMENT

In this case the Buchbinders have been severely punished twice for an allegation of misconduct before the Ninth Circuit Court of Appeals, which allegation of misconduct never actually took place.

In the past few years the American Public has began to question the validity of the taxing powers being imposed upon them. These questions have brought a hysterical response from the IRS agency who administers these tax provisions, the agency has exemplified a negative term for these individuals "**TAX-PROTESTER**" an undefined term.

Through the Croasman Memorandum and IRS seminars conducted for the benefit of Federal Court Judges, these Judges have become accustomed to turning their face against any politically unpopular argument involving the tax laws. It has now become judicially expedient to merely deem any unpopular tax argument a frivolous tax-protester argument and dispense with the case without any semblance of judicial review, and it is this expedience the Buchbinders have found themselves the victims of.

## OPINIONS BELOW

The Orders of the Court of Appeals for the Ninth Circuit have not been reported. They are copied and attached to the appendix hereto, APP. A & D, *infra.*

The Order and Decision of the United States Tax Court has been reported. It is copied and attached to the appendix hereto, APP. B, *infra*.

The Memorandum Opinion of the United States Tax Court has been reported TC Memo 1994-7. It is copied and attached to the appendix hereto, APP. C, *infra*.

## JURISDICTION

The Commissioner's Notice of Deficiency issued to the Buchbinders on February 11, 1992, and the Buchbinders filed a timely petition to the U.S. Tax Court. The Tax Court ruled against the Buchbinders merely stating, without any substantial findings, that the Buchbinders were raising "FRIVOLOUS NONSENSICAL TAX-PROTESTER ARGUMENTS" the final Order and Decision of the Tax Court entered on January 14, 1994. The Buchbinders filed a timely Notice of Appeal to the Ninth Circuit Court of Appeals. The Commissioner by Motion argued for dismissal of the Buchbinders' Appeal for failure of the Buchbinders to pay sanctions from a previous appeal numbered CA 92-70114. The Buchbinders timely petitioned the appeal Court for Rehearing which petition was denied on June 11, 1994.

Jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

Authority to proceed in this Court is by authority of the people of the united States by their Constitution, Article III Section 2, Clauses 1 and 2, in which this Court has appellate jurisdiction.

## STATUTORY PROVISIONS INVOLVED

Title 5 United States Codes (Government Organization and Employees)

§ 554 *Adjudications*

§ 556 *Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.*

§ 702 *Right of review*

§ 703 *Proper Venue for Court of Review*

§ 706 *Scope of review*

*SPECIFICALLY*

§ 554(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved –

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court; [in pertinent part]

**§ 702 Right of review**

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof . . . [in pertinent part]

**§ 703 Form and venue of proceeding**

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any

applicable form of legal action, including actions for declaratory judgements or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction . . . [in pertinent part]

**§ 706 Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the *whole record* or those parts of it cited by a party, and due account shall be

taken of the rule of prejudicial error. [in pertinent part, Emphasis added]
(Sept. 6, 1966, P.L. 89-554, § 1, 80 Stat. 393).

## CONSTITUTIONAL PROVISIONS INVOLVED

Amendments to the United States Constitution

Amendment I of the United States Constitution provides in pertinent part:

> Congress shall make no law respecting . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment V of the United States Constitution provides in pertinent part:

> No person shall. . . . be deprived of life, liberty, or property, without due process of law;

Amendment IX of the United States Constitution provides in pertinent part:

> The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

## STATEMENT OF THE CASE

The Buchbinders were previously issued Notices of Deficiency from the Commissioner of Internal Revenue, the issue involved investments that Bruce Buchbinder had made. In the first deficiency action the basis for the Notice of Deficiency related to the treatment of a forward

contract and certain research and development expenditures which the Buchbinders claimed on their 1981 federal income tax returns and which were disallowed by the IRS. Nothing about that case involved "**WAGES**". In the second deficiency action, the basis for the Notice of Deficiency related to a 10-percent profit and loss interest in the partnership which the Buchbinders claimed on their 1983 Federal Income Tax Returns, and which was disallowed by the IRS.

In the first deficiency action the Buchbinders challenged the validity of the Notice arguing that this was an unapportioned direct tax being imposed upon their personal property. The Buchbinders argued that the rule of apportionment for direct taxes applied to personal property as well as real property *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S.Ct. 673, aff. reh., 158 U.S. 601, 15 S.Ct. 912 (1895), and that the dividends received from invested capital was as much personal property as the invested capital *Pollock*, supra.

After the ratification of the Sixteenth Amendment it was held that nothing in the Amendment repudiated the holding in *Pollock* that a tax on real or personal property was direct and must be applied by the rule of apportionment *Brushaber v. Union Pacific Railroad Company*, 240 U.S. 1, 36 S.Ct. 236 (1915). That the term income in the Sixteenth Amendment cannot be interpreted so as to modify or repeal the original Articles of the Constitution, Congress cannot conclude what is and what is not income, and it has now become the duty of the Courts to determine on a case by case basis whether the income tax is operating as a "DIRECT TYPE TAX" or whether it is

operating as an "INDIRECT TYPE TAX," giving no regard to form, but giving due regard to truth and substance *Eisner v. Macomber,* 252 U.S. 189, 206, 40 S.Ct. 189 (1920).

The Tax Court in the first case arbitrarily deemed the Buchbinders' arguments *tax-protester gibberish,* without any finding that the Notice of Deficiency was valid, without jurisdictional review, without review of agency authority, or review of the constitutional issues, and upheld the Commissioner's deficiency allegation.

The Buchbinders timely appealed to the Ninth Circuit Court of Appeals for a de novo review, making the same argument as above. The commissioner in its brief argued that the Buchbinders were making tax-protester arguments that "***WAGES ARE NOT INCOME,***" however the Commissioner's attorney knew, or should have known, full well that wages were not even an issue in that case, nor was that proposition ever brought before the Court.

For whatever unknown reason the Ninth Circuit adopted the Commissioner's argument, upheld the Tax Court decision, and sanctioned the Buchbinders for making a frivolous argument, which the Buchbinders never actually made. The Buchbinders refused to pay the sanctions and instead petitioned this Court for a Writ of Certiorari, and ultimately for a Rehearing.

The second Notice of Deficiency, which has led to this appeal, the Commissioner issued the deficiency notice for additions to tax under IRC Section 6659(a), but,

it involved the same tax consequences as the first Notice of Deficiency. The Buchbinders again timely petitioned the U.S. Tax Court raising the arguments referenced herein earlier. The Tax Court again entered the same arbitrary decision against the Buchbinders contending that the Buchbinders arguments were tax-protester gibberish. Again the Buchbinders appealed to the Ninth Circuit Court of Appeals for a de novo review, only this time the Commissioner by motion sought to have the Buchbinders' appeal dismissed on the contention that the Buchbinders had failed to pay the sanctions imposed by the Ninth Circuit in the Buchbinders' first appeal.

## REASONS FOR GRANTING WRIT

The Tax Court is a very peculiar Court, and petitioners before the Tax Court are being treated as though they were plaintiffs bringing forward a cause of action and suffered with all the burdens of going forward that an ordinary plaintiff would be suffered with. But, in reality a petitioner in Tax Court is merely appealing what is presumed to be an administrative determination that has already been made by the Commissioner.

Today there are many Tax Court Memorandum decisions reported, and reported and unreported Appeal Court decisions affirming these Tax Court decisions, where not one iota of evidence or record was ever introduced supporting the Commissioner's determination. The Buchbinders truly believe this is because it is very unclear as to who has what burden in the Tax Court, and

what the scope and standard of review a petitioner in Tax Court has a right to expect.

There are scant few cases regarding the Commissioner's burden in Tax Court cases, *Portillo v. C.I.R.*, 932 F.2d 1128 (5th Cir., 1991), and the Buchbinders can find no statutes relating to the standard of review which a petitioner in the Tax Court would be entitled to, other than Title 5 U.S.C. Sections 701 through 706. However, there are no Court decisions regarding this matter. This leaves an individual contemplating petitioning the Tax Court in a quandary as to whether it is the correct course of action to take, and this makes it entirely impossible for an individual to properly prepare his case for the review he seeks.

It is the customary practice in this American Society to settle the people's disputes with government agencies in the Courts, this case however is a classic example of how the doors to the very Courts who are sworn to protect the people are slowly being closed to the people.

The Buchbinders have personal knowledge of at least ten (10) similar cases where the Tax Court has refused to review the facts of the cases pled by certain petitioners, or to review the laws those petitioners sought to apply to their own facts for the court's review. The Tax Court in every known instance has refused to review in toto those facts and laws together; *See Jack B. Karlin v. Commissioner*, TCM, CCH Dec. 46,877(M) (1990); *James M. Boyce, Jr. and Shelley A. Boyce v. Commissioner*, TCM, CCH Dec. 46,945(M) (1990); *Orian E. Wright v. Commissioner*, TCM, CCH Dec. 46,677(M) (1990); *William B. Urban v. Commissioner*, TCM, CCH Dec. 46,592(M) (1990); *Orian E. Wright*

*v. Commissioner,* TCM, CCH Dec. 46,573(M) (1990); *Stanley Earl Bush v. Commissioner,* TCM, CCH Dec. 46,486(M) (1990); *Jon L. and Monica A. Brayton v. Commissioner,* TCM, CCH Dec. 46,215(M) (1989); *John P. Ladika v. Commissioner,* TCM, CCH Dec. 45,733(M) (1989); *Wilcox v. Commissioner,* 848 F.2d 1007 (9th Cir. 1988). In each of the above mentioned cases those petitioners were merely labeled "Tax Protesters," their arguments were arbitrarily concluded to be frivolous, and it was concluded that their petitions were taken for delay and heavy sanctions were imposed upon each one, in most instances the maximum amount allowable, all the conclusions were absolutely unsupported by any meaningful findings. The Buchbinders reasonably believe that there are many other similar cases that have been disposed of in this arbitrary and fast-track manner by the United States Tax Court, and probably affirmed by the Circuit Courts of Appeal, mostly in unpublished opinions.

An individual's constitutional right of access to the Courts has been upheld times innumerable. Perhaps the most comprehensive analysis of this issue can be found in the Annotation of *WHAT, IN VIEW OF SUPREME COURT, CONSTITUTES THE CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS,* 52 L. Ed. 2d 779. In *Gilmore v. Lynch,* 319 F. Supp. 105 (DC Cal. 1970) Affd. 404 U.S. 15, 30 L. Ed. 2d 142, 92 S. Ct. 250 the District Court, in a decision affirmed without opinion by the Supreme Court, has defined access to the Courts as encompassing "all means a *defendant* or *petitioner* might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him". Although most of the cases on this issue have involved state review

procedures, the Supreme Court has indicated that the same principles are applicable to federal avenues of review. *See United States v. MacCollom,* 426 U.S. 317, 49 L. Ed. 2d 666, 96 S. Ct. 2086 (1976). Moreover, these cases involved prisoners, and for the most part were habeas corpus actions. Therefore, the common everyday Citizen's constitutional right of meaningful access to the Courts would seem to be a novel question and question of first impression.

One of the reasons this Court will grant Cert. is to resolve conflicts in the appeal courts, but more important this Court should invoke its appellate powers to curb abuses to litigants in the lower courts through judicial usurpation of powers. And this is what this petition is about, the Buchbinders have been extremely punished by the Ninth Circuit Court of Appeals for something that the Buchbinders never actually did, and the punishment is so extreme that the Buchbinders have been substantially denied access to meaningful judicial review of their case.

Further, it would be of extreme importance to thousands of petitioners before the U.S. Tax Court to have the matter resolved regarding the burden of proof, standard and scope of review.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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DATED: October 4, 1994

**APPENDIX A**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| BRUCE BUCHBINDER, et al., Petitioners-Appellants, vs. COMMISSIONER INTERNAL REVENUE SERVICE, Respondent-Appellee. | ) | No. 94-70188<br>IRS# 8927-92<br>ORDER<br>(Filed June 9, 1994) |

Before: TANG, PREGERSON and T.G. NELSON, Circuit Judges

Appellee moves to dismiss this appeal for appellants' failure to pay sanctions previously imposed on them by this court. Appellants move for leave to file a late opposition to the motion to dismiss. The motion for leave to file the late opposition is granted. The motion to dismiss the appeal is granted. *See Hymes v. United States,* 993 F.2d 701 (9th Cir. 1993); *Hacopian v. U.S. Dept. of Labor,* 709 F.2d 1295 (9th Cir. 1983).

**APPENDIX B**

UNITED STATES TAX COURT
Washington, D.C.

| | | |
|---|---|---|
| BRUCE AND ELAINE BUCHBINDER, | ) | |
| Petitioner(s), | ) | Docket No. 8927-92 |
| v. | ) | |
| COMMISSIONER OF INTERNAL REVENUE, | ) | |
| Respondent. | ) | |

ORDER AND DECISION

Pursuant to the determination of the Court in its T.C. Memo. 1994-7, filed January 10, 1994, it is

ORDERED that respondent's oral motion for the imposition of a penalty pursuant to I.R.C. section 6673(a), made at the trial of this case on May 17, 1993, is granted. It is further

ORDERED AND DECIDED that there is an addition to tax due from petitioners for the year 1983 pursuant to I.R.C. section 6659(a) in the amount of $336.30 and that a penalty is due from petitioners which is hereby awarded to the United States in the amount of $250 pursuant to I.R.C. section 6673(a).

/s/ Daniel J. Dinan
Daniel J. Dinan
Special Trial Judge

Entered: JAN 14 1994

## APPENDIX C

T.C. Memo. 1994-7

UNITED STATES TAX COURT

BRUCE AND ELAINE BUCHBINDER,
Petitioners *v.* COMMISSIONER OF
INTERNAL REVENUE, Respondent

Docket No. 8927-92. Filed January 10, 1994.

Bruce and Elaine Buchbinder, pro se.

*James P. Thurston,* for respondent.

MEMORANDUM OPINION

DINAN, *Special Trial Judge:* This case was heard pursuant to the provisions of section 7443A(b)(3) and Rules 180, 181, and 182.[1]

Respondent determined that petitioners are liable for an addition to tax under section 6659(a) for the year 1983 in the amount of $12,110.70.

This case was calendared for trial at the May 17, 1993, trial session of the Court in San Francisco, California. On April 22, 1993, and on April 23, 1993, respectively, the Court received copies of petitioners' and respondent's trial memoranda.

In her trial memorandum, respondent informed the Court that the $12,110.70 figures in the statutory notice of deficiency was incorrect and that the correct amount is $336.30. The only issue for decision in this case, therefore,

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[1] All section references are to the Internal Revenue Code in effect for the year in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

is whether petitioners are liable for an addition to tax under section 6659(a) for the year 1983 in the amount of $336.30. Petitioners were informed of this lesser amount by respondent as early as November 1992.

From the parties' trial memoranda, we learn that sometime during 1983, petitioner Bruce Buchbinder (hereinafter petitioner) acquired a 10-percent profit and loss interest in a partnership known as Stookey Herd V Joint Venture (hereinafter the partnership).

On December 28, 1983, Stookey Herd, Inc. transferred three Holstein cows to the partnership having an alleged value of $200,000 each. On its Federal partnership return for 1983, the partnership claimed an investment credit basis in the Holsteins of $600,000. Based upon petitioner's 10-percent profit and loss interest in the partnership, petitioners reported on their 1983 Federal income tax return a qualified investment basis, for the computation of the investment tax credit, in the amount of $60,000. They also claimed a loss from the partnership of $27,113.

On April 7, 1988, respondent issued a Notice of Final Partnership Administrative Adjustment (FPAA) to Robert and Novine Eggers, the tax matters partners of the partnership, which made adjustments to the partnership's ordinary income, losses, and credits for the years 1983, 1984, and 1985.

In response to the FPAA, Mr. and Mrs. Eggers filed a petition with this Court, docket No. 22452-88, seeking a readjustment of partnership items under section 6226.

On September 1, 1988, petitioners also filed a petition on behalf of the partnership as "partners other than the Tax Matters Partner." Petitioners' petition at docket No. 22680-88 was dismissed on December 5, 1988, for lack of jurisdiction.

The partnership case at docket No. 22452-88 was settled and a decision was entered on February 14, 1991. As part of the decision, the partnership's reported Partnership Investment Credit Basis In Qualified Property of $600,000, relating to the Holsteins, was redetermined to be $196,313.

Following the entry of the decision in the partnership's case at docket No. 22452-88, respondent, on February 11, 1992, issued a statutory notice of deficiency to petitioners determining an addition to tax under section 6659(a) for 1983 in the amount of $12,110. As we have noted, *supra*, respondent conceded before trial that the correct amount of the section 6659(a) addition to tax is $336.30.

In their trial memorandum, petitioners submit that the issues and/or questions presented in this case are as follows:

ISSUES AND/OR QUESTIONS PRESENTED

1. Whether the gross income figure that forms the basis for the alleged deficiency determination herein is premised upon the Buchbinders' "money," and if so is the Buchbinders' "money" considered their "personal property?" California Government Code Sections 180, 54030 and California Evidence Code Section 180.

California Evid. C. § 180

> "Personal property" includes money, goods, chattels, things in action, and evidences of debt.

2. If the answer to question number 1 is yes, then does a tax premised upon the Buchbinders' "gross money" constitute a direct tax upon "personal property," and if so, because of the Buchbinders' citizenship status, is the imposition of such a tax, notwithstanding Amendment XVI, forbidden by Article I, Section 2, Clause 3 and Article I Section 9, Clause 4 of the United States Constitution unless applied by the rule of apportionment?

> A tax upon "real or personal property" is a direct tax and must be applied by the rule of apportionment. *Pollock v. Farmers Loan and Trust Co.*, 157 U.S. 429, 15 S. Ct. 673, reh. den., 158 U.S. 601, 15 S. Ct. 912 (1895); The Sixteenth Amendment did nothing to modify the express holding in *Pollock*, that a tax upon "real or personal property [sic] is a direct tax that must be imposed by the rule of apportionment. And the Sixteenth Amendment must be interpreted so as not to "repeal or modify" the original Articles of the Constitution. *Brushaber v. Union Pacific Railroad company [sic]*, 240 U.S. 1, 36 S.Ct. 236 (1915) [sic]; *Eisner v. Macomber*, 252 U.S. 189, 206, 40 S.Ct. 189 (1920).

In deciding this matter must this Tax Court abide by the decisions of the United States Supreme Court, notwithstanding decisions of the Ninth Circuit Court of Appeals, or other Federal Appeals Court, that may be to the contrary?

In the following 21 pages of their trial memorandum, petitioners proceeded to present typical, discredited, tax-protester arguments, including:

> UNCONTROVERTED ISSUES OF FACT
>
> A. Bruce & Elaine Buchbinder are natural born Citizens of one of the several States of the continental States United. As such natural born Citizens the Buchbinders enjoy a constitutionally guaranteed immunity from all direct taxes that are not applied by the rule of apportionment, and all indirect taxes that are not applied by the rule of uniformity. The taxes here in question are a graduated and progressive tax measured by income. These taxes are not applied by the rule of apportionment nor by the rule of uniformity, thus, they operate upon matters exterior to the borders of the continental states united, and the Buchbinders do not fall within the purview of these taxes.

Petitioners' tax protester arguments are nonsensical.

When this case was called for trial, petitioner refused to address the issue of whether petitioners were liable for the section 6659(a) addition to tax. Petitioner insisted upon pursuing the inane rantings contained in petitioners' trial memorandum.

We will not dress petitioners' frivolous tax-protester ramblings with a cloak of respectability. As was stated by the Fifth Circuit in *Crain v. Commissioner*, 737 F.2d 1417 (5th Cir. 1984): "We perceive no need to refute these arguments with somber reasoning and copious citation of

precedent; to do so might suggest that these arguments have some colorable merit."

The determination of respondent that petitioners owe an addition to tax under section 6659(a) in the amount of $336.30 for 1983 is sustained.

Prior to the trial of this case, the Court had a joint telephone conference with the parties. During that conference call the Court admonished petitioner not to pursue at trial the frivolous tax protester arguments contained in petitioners' trial memorandum.

When this case was called from the calendar at the trial session of the Court in San Francisco on May 17, 1993, the Court again admonished petitioner that he would be ill advised to pursue his tax protester arguments. He was given a copy of the Internal Revenue Code by the Court and was given sufficient time to acquaint himself with the provisions of section 6673; petitioner would not be deterred.

We find that petitioners in this case have pursued a frivolous cause of action. We find that they are liable for a penalty in the amount of $250.00 under the provisions of section 6673.

*An appropriate order and decision will be entered for respondent.*

## APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| BRUCE BUCHBINDER, et al., Petitioners-Appellants, vs. COMMISSIONER INTERNAL REVENUE SERVICE, Respondent-Appellee. | No. 94-70188<br>IRS# 8927-92<br>ORDER<br>(Filed July 11, 1994) |

Before: TANG, PREGERSON and T.G. NELSON, Circuit Judges

Appellants' petition for rehearing is denied. No further filings will be accepted in this closed docket.